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Office-Supreme Court, U.S.
FILED
JAN 14 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-883

# In the Supreme Court of the United States

**October Term, 1984**

EVA KOLLSMAN, CITY NATIONAL BANK,
as Special Administrators of the Estate of
Paul Kollsman, deceased,

*Petitioners,*

*v.*

CITY OF LOS ANGELES,
a municipal corporation,

*Respondent.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 84-833

# In the Supreme Court of the United States

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EVA KOLLSMAN, CITY NATIONAL BANK,
as Special Administrators of the Estate of
Paul Kollsman, deceased,

*Petitioners,*

*v.*

CITY OF LOS ANGELES,
a municipal corporation,

*Respondent.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

### INTRODUCTION

The City's Brief in Opposition is a classic of evasion and obfuscation.

The central substantive issues in this case are Constitutional. They are related to the issues now pending in this Court in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, No. 84-4, and deal with the Federal

Constitutional rights of a property owner whose ability to make economically viable use of his land has been destroyed by local government regulation.[1]

Rather than deny the unfairness of its action,[2] or deal directly with the Ninth Circuit's attempt to make abstention " . . . the absolute rule . . . " in cases such as this (*Kollsman v. City of Los Angeles* [9th Cir 1984] 737 F 2d 830, 844 [App A, p A-30]; Reinhardt, J., dissenting), the City attempts to divert this Court's attention.

The largest part of the City's brief attempts to place the blame for any delay on Mr. Kollsman's lawyers because they brought a state law issue to the attention of the District Court. However, when the case had been under submission without decision for nearly a year after trial and, in the interim, new statutes had been enacted, wasn't it the obligation of counsel (as officers of the court) to bring the statutes to the court's attention? How does that excuse the City's actions? How does it justify the Ninth Circuit's determination to create its own body of abstention law which is at odds with the decisions of this Court and the other Circuits?

The City's brief demonstrates the need for this Court's intervention to protect the rights of litigants to have timely Federal decisions in cases whose primary focus is on Federal questions.

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[1] Please recall that the City's appraiser as well as Mr. Kollsman's appraiser testified that the regulations rendered the 85 acre subject property useless. (See Pet., p 4.)

[2] The most the City is able to do is assert that inflation coupled with the passage of time may have supplied some relief from the City's stringent restrictions. (See Br. in Opp., pp 24-25.) The City overlooks that inflation affects construction costs as well as sale prices. Moreover, the effect of the City's actions must be measured as of the date of their occurrence. Inflation hardly seems a Constitutional solution to unconstitutional deprivations.

## THE NINTH CIRCUIT'S ABSTENTION DECISIONS ARE OUT OF TOUCH WITH THOSE OF THIS COURT AND OTHER CIRCUITS

### No Other Circuit Holds Constitutional Cases Involving Land Use To Be *Automatically* "Sensitive"

In 1976, the Ninth Circuit held that a Constitutional case about land use involved sensitive issues of local concern. (*Rancho Palos Verdes Co. v. City of Laguna Beach* [9th Cir 1976] 547 F 2d 1092, 1094) While such a holding *may* have been appropriate under the facts of *that* case, at *that* point in the development of California land use law, and at *that* point in the development of Federal law relating to the consequences of overly restrictive land use regulations,[3] it has since been repeated by the Ninth

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[3] *Rancho Palos Verdes* was based in part on a concern for government entities whose stringent land use regulations " . . . may unwittingly have resulted in a seizure of property rights that they did not intend and cannot afford." (547 F 2d at 1095) This concern for the regulator, rather than the property owner, was expressed without the benefit of this Court's more recent decisions in *Kaiser-Aetna v. U.S.* (1979) 444 US 164, *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 US 621, *Loretto v. Teleprompter Manhattan CATV Corp* (1982) 458 US 419, and *Ruckelshaus v. Monsanto Co.* (1984) ___ US ___, 81 L Ed 2d 815. As those cases make clear, the test is the effect on the owner. The issue of the appropriate remedy for property owners in such cases is, of course, now pending before this Court in *Williamson County Reg. Plan Comm'n v. Hamilton Bank*, No. 84-4.

Even when denying relief to property owners since *Rancho Palos Verdes*, this Court has expressly warned that — as a matter of Federal law — regulations cannot be countenanced when they destroy private rights in the process. (*Agins v. City of Tiburon* [1980] 447 US 255; *Penn Central Transp. Co. v. City of New York* [1978] 438 US 104)

The Ninth Circuit has not re-evaluated the underpinnings of its rule since *Rancho Palos Verdes*.

Circuit in talismanic fashion, as though *all* cases in any way dealing with land use *automatically* involve sensitive issues of local concern. (*Sederquist v. City of Tiburon* [9th Cir 1978] 590 F 2d 278, 281; *Santa Fe Land Improvement Co. v. City of Chula Vista* [9th Cir 1979] 596 F 2d 838, 840; *Isthmus Landowners Assn. v. State* [9th Cir 1979] 601 F 2d 1087, 1091; *C-Y Dev. Co. v. City of Redlands* [9th Cir 1983] 703 F 2d 375, 377; *Kollsman v. City of Los Angeles* [9th Cir 1984] 737 F 2d 830, 833)

That the Ninth Circuit is able to recognize exceptions to its rule (see the two cases cited at Br. in Opp., p 17) does not alter the fundamental fact that the Ninth Circuit's *rule* is an automatic finding of local sensitivity, resulting in a near uniform requirement of abstention.

*No other Circuit* has adopted such a rote presumption of a need for abstention.

**No Other Circuit Has Attempted To Make Abstention The Rule In Any Particular Substantive Field, As The Ninth Circuit Has In Land Use Cases Involving Constitutional Issues**

In their Petition, the Kollsman heirs noted that when other Circuits confront the substantive problem at bench, they treat each case individually, as this Court has taught, with no preconceived notion of abstention. (See cases cited at Pet., p 14.)

The City suggests that other Circuits act just as the Ninth Circuit does, citing five cases. (Br. in Opp., p 16)

The City is wrong. In each case, individualized treatment is apparent.

Startlingly, in two of the cited cases, District Court *abstention orders were reversed* by the Third and Eleventh Circuits. (*Heritage Farms, Inc. v. Solebury Township* [3d Cir 1982] 671 F 2d 743; *Nasser v. City of Homewood*

[11th Cir 1982] 671 F 2d 432) *Heritage* and *Nasser* support the Petitioners' position, not the City's.

The remaining cases do not aid the City. The do *not* demonstrate the reflex abstention facing property owners in the Ninth Circuit. While the courts *did* abstain in those cases, it was only after a particularized examination of the facts and issues. In *none* was local sensitivity *presumed* as it is by the Ninth Circuit.

The Kolisman heirs do not suggest that abstention can *never* be appropriate under existing law. The point is that the Ninth Circuit has attempted to evade its responsibility to decide cases appropriately brought before it by, as Judge Reinhardt's dissent cogently puts it, making abstention "... the absolute rule..." (737 F 2d at 844 [App A, p A-30])

That action by the Ninth Circuit mocks this Court.

**No Other Circuit Finds Local Statutes "Unclear" Solely Because The Lawyer Who Lost In The District Court Says He Disagrees With The District Court**

The City repeatedly asserts that the Ninth Circuit's finding of a lack of clarity in state law was the result of careful study. (Br. in Opp., pp 14, 22)

But the City's *ipse dixit* cannot make it so.

The Court of Appeals' opinion clearly reveals that it did no more than find conflict between the District Court's analysis and the City's:

> "The uncertainty of state law issues is illustrated by comparing the reasoning of the district court with the City's arguments before this court." (737 F 2d at 834 [App A, p A-8)

Judge Reinhardt's dissent confirms this non-analysis. (See 737 F 2d at 838-839 [App A, at p A-18] [quoted at Pet, p 16].) Judge Reinhardt was present during the Court's internal deliberations. His assessment is undoubtedly more valid than the City's.

*No other court* has used this superficial, hypothetical method of analysis. (Compare, e.g., *Hawaii Housing Auth*, ____ US ____, 81 L Ed 2d at 195.)

**STATE LAW IS CLEAR**

The City repeatedly seeks to demonstrate the "unclear" nature of state law by contrasting the District Court's analysis with that of Judge Reinhardt's dissent and then chiding the Petitioners for failing to indicate which analysis they believe is correct. (Br. in Opp., pp 8-9, 18-23)

The problem with the City's position is that there is no *legal* dispute between the District Court and Judge Reinhardt. Rather, Judge Reinhardt's disagreement with the District Court was *wholly factual,* as his dissenting opinion repeatedly states:

> "Rather, the case turns principally on a *factual* issue with a painfully obvious answer." (737 F 2d at 837 [App A, p A-15]; emphasis added.)

(See also 737 F 2d at 838, 840, 842, 843 [App A, pp A-17, 21, 26, 28.)

The City's argument is no more than a smokescreen to obscure the real issues before this Court.

**THE NINTH CIRCUIT HAS VACATED SEVEN YEARS OF FEDERAL LITIGATION AND ORDERED PARTIAL LITIGATION IN THE STATE COURTS WITHOUT ANY GUIDANCE AS TO WHAT ISSUES REQUIRE STATE ADJUDICATION**

One of the problems with the way the Ninth Circuit determined that state law was unclear (i.e., cataloguing the City's disagreement with the District Court's analysis and listing all the red herring issues conjured up by the City and its amici) is that there is no clue as to what state issues are important to determine.

Nor is this case an isolated instance in Ninth Circuit jurisprudence. In *Newport Investments, Inc. v. City of Laguna Beach* (9th Cir 1977) 564 F 2d 893, 895, the Ninth Circuit expressly *refused* to tell the litigants what state issues required state determination.

In such a situation, the plaintiff is thrust into an unwanted vehicle and set adrift in undesired waters with neither chart nor compass. Please recall that, in abstention cases, the plaintiff doesn't want to litigate *any* issues in state court. In many cases — including this one — the plaintiff isn't even sure what issues require state court litigation.

The majority opinion at bench simply lists each issue that the fertile minds of the City Attorney and his three Amici Curiae could dream up and notes that this blizzard of questions somehow creates a lack of clarity in state law.

On the other hand, Judge Reinhardt's dissent *analyzed* that laundry list of issues and concluded that *none* required state court adjudication.

What is one to do? What is to be the scope of the state trial?[4]

It hardly seems helpful to say, as the Ninth Circuit did in *Newport Investments,* 564 F 2d at 895, that the state courts are " . . . fully capable . . ." of figuring out what issues they should decide.

Such a cavalier attitude flies in the face of this Court's philosophy expressed in *England v. Louisiana Medical Examiners* (1964) 375 US 411, 418, that, because of the delay and expense caused by abstention, the abstention doctrine and its working rules should be evidenced by a " . . . line drawn . . . bright and clear . . ."

Here, there is no line at all, let alone one that is " . . . bright and clear . . ."

It is unfair to the litigants and to both judicial systems for a Court of Appeals to issue an oracular order to go elsewhere and litigate some issues for a while.

If the abstention doctrine is to serve its purposes and minimize the grief and expense attendent upon its application, it hardly seems unreasonable to require the remanding court to specify the issues being remanded. Only that court knows why it ordered abstention.

## THE PETITIONERS HAVE NO "CHOICE" BUT TO WASTE ADDITIONAL YEARS LITIGATING IN BOTH STATE AND FEDERAL COURTS. THE COURT OF APPEALS SO *ORDERED*

In a startling display of jurisdictional ignorance, the City repeatedly suggests that the Kollsman heirs have

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[4]This is not a case in which there is already a state case pending. A complaint would need to be drafted in compliance with the Court of Appeals' opinion. But what must it include?

some "choice" whether to pursue litigation in the state courts or not,[5] and that the District Court might have the ability to eliminate the state court litigation.[6]

One thing should be clear: If they possess the stamina and financial ability to persevere, Mr. Kollsman's heirs will litigate in the state courts for one reason only: BECAUSE THE COURT OF APPEALS SO *ORDERED*. On this issue, the opinion is quite clear:

> "We conclude, therefore, that *abstention is required* in this case." (*Kollsman v. City of Los Angeles* [9th Cir 1984] 737 F 2d 830, 837 [App.A, pp A-14, A-15]; emphasis added.)

It is not within the power of the Kollsman heirs or the jurisdiction of the District Court to disregard the Ninth Circuit's direct order.

If the City is offering to stipulate that this Court remand the case to the Court of Appeals for the purpose of amending its opinion to order the District Court to proceed to enter judgment on the federal issues, the Kollsman heirs are willing to accept. Such a solution

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[5] " . . . any 'delay' occasioned by petitioners' *choice* to continue pursuit of this groundless claim in the state courts should not be of concern to this Court." (Br. in Opp., p 21; emphasis added.)

"Should they *choose* now to pursue this theory, which Judge Reinhardt found to be 'clearly erroneous,' in state court they cannot reasonably complain that such a litigation strategy will occasion a further 'delay' of resolution of the federal claims." (Br. in Opp., pp 28-29; emphasis added.)

[6] "Petitioners' highly unusual offer to 'forego' further litigation of their state claim (Petition at 6) should properly be *presented to the District Court* upon remand from the decision of the Court of Appeals, and should not be presented in a petition to this Court." (Br. in Opp., p 29; emphasis added.)

would resolve (for them) the problems they have asked this Court to resolve. But such a solution can be achieved only by this Court's remand to the Court of Appeals.

## CONCLUSION

The Ninth Circuit's abuse of the abstention doctrine needs this Court's attention. Its determination to avoid decision of cases challenging land use planning and zoning regulations on Federal Constitutional grounds has led it to invent rules which fly in the face of decisions of this Court and other Courts of Appeals.

Such rules abuse the parties and both judicial systems. They manifoldly increase the cost of litigation and delay its outcome. The case at bench is already seven years old. When will it end? The *Sederquist* litigation has consumed ten years because of a similar order. It is not yet concluded. (See *Sederquist v. City of Tiburon* [9th Cir 1978] 590 F 2d 278; *Sederquist v. City of Tiburon* [9th Cir 1984] ____ F 2d ____.) It is the rarest litigant who can be expected to endure this kind of lengthy, expensive shuttling between judicial systems. That is not a system of justice.

It is time for this Court to call a halt to the Ninth Circuit's peculiar brand of abstention and allow the District Courts in this Circuit to perform their traditional roles as protectors of Federal Constitutional rights.

The Kollsman heirs pray that the Petition be granted.

Respectfully submitted,

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**PROOF OF SERVICE BY MAIL**

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*County of Los Angeles*

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on January 11, 1985, I served the within *Reply Brief In Support of Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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